

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75 C 2141

To Be Argued By
JOAN P. SCANNELL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES ex rel. NICHOLAS MYSHOLOWSKY, :

Petitioner-Appellant, :

-against- : 75-2141

PEOPLE OF THE STATE OF NEW YORK, :

Respondent-Appellee. :

-----X

BRIEF FOR RESPONDENT-APPELLEE

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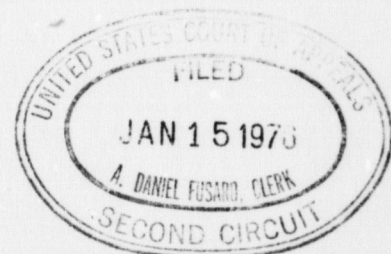


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BRIEF FOR RESPONDENT-APPELLEE

Petitioner-appellant appeals from a decision of the United States District Court for the Eastern District of New York, Costantino, J., dated June 12, 1975, denying petitioner-appellant's application for a federal writ of habeas corpus.

Question Presented

Whether the three positive pre-Stovall trial and lineup identifications of petitioner were reliable, untainted by pre-trial identification procedures, and satisfied due process of law?

Preliminary Statement

Petitioner-appellant ("petitioner") was convicted on June 22, 1954 after a jury trial in the County Court, Queens County, of the crimes of robbery in the first degree, grand larceny in the first degree and two counts of assault in the second degree. Petitioner was sentenced (Hopkins, J.) as a second felony offender, to fifteen to thirty years on the robbery count, five to ten years on the larceny count and two and one half to five years on each of the assault counts; the sentences to be served concurrently. The conviction was affirmed by the Appellate Division, Second Department (1 App. Div. 2d 1036 [2d Dept. 1956]).

On September 17, 1956 petitioner was denied leave to appeal to the New York Court of Appeals (Fuld, J.). In 1969 petitioner was released on parole from a state correctional facility. Subsequently, in 1971 petitioner was convicted in the United States District Court for the Eastern District of New York (Costantino, D.J.) on a plea of guilty to bank robbery. Petitioner was sentenced to seven years imprisonment and is presently incarcerated at the Federal Penitentiary at Lewisburg, Pennsylvania. As a

result of the federal conviction, a New York State parole violation warrant was lodged against petitioner and is still outstanding.

Nearly two decades after his conviction was affirmed in the New York appellate courts, petitioner sought federal habeas relief resulting in this appeal.

Statement of Facts

A. The Crime

On September 22, 1953 Mrs. Tully was robbed at gunpoint of \$4,800.81. The facts surrounding this crime of which petitioner was convicted, were testified to at length by three eyewitnesses during the course of the trial. On the afternoon of September 22 Mrs. Tully, a bookkeeper for Adams Industries, obtained the weekly payroll amounting to \$4,800.81 from the National City Bank. Her husband, as was his custom, drove Mrs. Tully back to the plant. Upon arrival Mrs. Tully got out of the car, walked to the freight elevator and rang the bell (79). While waiting for the freight elevator to come down a man (later identified as petitioner) wearing a brown straw hat, tan trousers and a light green waist length jacket (103-104) came up to the elevator, rang the bell and stood

in front of Mrs. Tully (83). When the elevator arrived, Mrs. Tully remained standing on the sidewalk because she would not ride the elevator with strangers (243). Petitioner stepped into the elevator and requested the second floor. The elevator operator Mr. Santorio, explained to petitioner that this was a freight elevator and escorted petitioner by the arm out of the elevator on to the sidewalk, pointing out a stairway further down the building (97, 222-3). At this point petitioner pulled a gun and stated "Get in there or I will kill you" (105, 223). Mr. Santorico and Mrs. Tully obeyed and entered the elevator. At petitioner's command Mrs. Tully threw the envelope containing the \$4,800.81 in payroll money at his feet (109, 226). Petitioner picked up the envelope, reached to pull the strap of the elevator door but could not pull it. He then ordered Mr. Santorico to close the door and backed away from the elevator (111, 228).

During the above events, Mr. Tully was seated in his car parked at the curb approximately twenty feet away (329). When he saw his wife being pushed into the elevator, he attempted to get out of the car but a man

(whom he later identified as petitioner's co-defendant Sadowy) wearing a brownish cap (344), dark trousers and a jumper jacket, came to the left side of the car pointed a gun at him and stated "Stay where you are" (302) demanding the car keys. Mr. Tully complied. Sadowy then ran to a 1947 or 1948 green Buick with a blueish tinge 50 to 60 feet in front of Mr. Tully's car (303, 312). At the same time, petitioner ran to Mr. Tully's car, got in the front seat, and told him to "Get going" (307). Mr. Tully replied that he couldn't because Sadowy had taken his keys. Petitioner then alighted and ran towards the same car to which Sadowy had run. They drove away, at which point Mr. Tully started to run after them yelling "Holdup". (310)

B. Opportunity for Observation

When petitioner rang the elevator bell he stepped right in front of Mrs. Tully and was no more than a foot away from her (81). Mrs. Tully testified that she was looking at his face as he rang the bell (83) and kept watching him approximately a half minute, the time it took the elevator to arrive. During this time petitioner was standing in front of Mrs. Tully and facing her (87-88).

After petitioner had pulled a gun and when Mrs. Tully was ordered to throw the payroll envelope to the floor, she was three or four feet from petitioner (110). Santorico, the elevator operator, was about two feet from petitioner when petitioner initially stepped into the elevator (222). When Mr. Santorico attempted to guide petitioner to the stairway he was right next to petitioner facing him (223). When Mrs. Tully threw the envelope to the floor Santorico was three or four feet from petitioner (226). Santorico was asked if he looked at the man, to which he replied: "I was staring at him" (248). Mr. Tully was looking at petitioner as he was coming off the elevator with the envelope. Then petitioner got in the car next to Mr. Tully, at which point Mr. Tully noticed that the petitioner's hair, which could be seen tucked below the hat, was grey. (349, 379)

C. Viewing of Pictures

The afternoon of the robbery, Mr. and Mrs. Tully went to a part of the Bureau of Criminal Identification known as the Rogues Gallery (496). At this time Mr. and

and Mrs. Tully went through numerous photographs but could not identify anyone. (497) A picture of petitioner was among these photographs but it was taken in 1938. (387) Mr. and Mrs. Tully then proceeded to pick out pictures that resembled the robber in order to get a composite picture. The pictures which were selected all depicted a man with a round face and heavy build (498-9).

Approximately three weeks after the robbery Mrs. Tully was shown a picture of petitioner (Peo. Exh. 6) by a detective at her office. Mrs. Tully stated that she did not recognize it because it was of a young man (139, 530). This photograph of petitioner had been taken fifteen years earlier in 1938. (387) About a week later Detective Buchs showed Mrs. Tully another picture of petitioner taken in 1952 (Peo. Exh. 5). At that time Mrs. Tully stated that the picture looked like the man who held her up but he would have to be twenty or thirty pounds heavier. Mrs. Tully also said that she could not be sure from the picture, and would have to see him in person (153-5). Two or three days after Mrs. Tully was shown the 1952 picture of petitioner, Mr. Tully went down to the police station and was shown the same picture.

On the way to the station Mrs. Tully discussed the picture with her husband and told him that she had an idea that it may be the fellow but doubted it on account of the weight (171). Mr. Tully was shown the picture which he likewise stated looked like the man but he would have to be heavier (369). Mr. Tully also stated that he would have to see the man in person before he would say if it were he or not.

After her husband viewed the picture Mrs. Tully was shown the picture again, this time in a spread with other photographs, and started that she still wanted to see the man (155). On the same day as Mrs. Tully saw the 1938 picture of petitioner, Mr. Santorico was shown the picture of petitioner along with four or five other photos but did not identify any of them (237, 512-3). Approximately three and a half weeks after the robbery Mr. Santorico was again shown a spread of three or four pictures including the 1952 picture of petitioner. Mr. Santorico failed to identify any of these pictures (392).

Subsequent to the viewing of all the photographs by Mr. and Mrs. Tully and Mr. Santorico petitioner was taken into custody on October 22, 1953 (292).

D. Lineup

On the same day that petitioner and his co-defendants were taken into custody and a month after the robbery a lineup was conducted. Three policemen in civilian clothes and the two suspects, petitioner and his co-defendant participated in the lineup. The three policemen who participated in the lineup were about the same height and weight as petitioner (445-6). Each testified at trial and thereby afforded the jury an opportunity to view them (1014, 1029, 1044). Mrs. Tully, Mr. Tully and Mr. Santorico testified that all the men in the lineup were wearing casual clothes and were all about the same height and weight (279, 286, 288, 373-4). The suspects were informed that they could take whatever positions they wished in the lineup (448). One at a time Mr. Tully, Mrs. Tully and Mr. Santorico went into the lineup room and emerged without saying anything to one or another as they had been instructed (179-180). When each emerged from the room, each went into a different corner of the adjoining room and did not speak to one another (182). In the lineup room petitioner and his co-defendant were told that they could change their positions in the lineup before they were viewed again, but they both chose to retain the same positions (448). Mr. Tully, Mrs. Tully and Mr. Santorico

separately viewed the lineup for a second time. All three pointed out petitioner and said that they recognized him immediately the first time. When questioned how long it took to recognize petitioner, Mrs. Tully replied "I recognized him immediately" (189). Mrs. Tully testified that she did not believe that she noticed petitioner because of the pictures (185). When asked what it was particularly about petitioner made her feel that he was the robber, Mrs. Tully replied: "It was merely a matter of recognizing his face. I saw him and I recognized him again when I saw him." (186)

E. Trial

At trial Mrs. Tully testified that she never wore glasses (92). She testified that while waiting for the elevator for about one half minute petitioner was facing her about a foot away and she was looking at him (81, 87). Mrs. Tully described the robber as wearing a waist length jacket, having a flat collar and of poplin fabric (which she explained as being soft cotton (103). He also wore a tan straw hat (104) which had a green leaf in the band (82). She described him as having a tight mouth with a chubby

face and cheeks, heavy built and possibly of Polish origin (122). He weighed about 170, 180 pounds (159) and was about 5'8" or 5'10" in height. Mrs. Tully testified that she was not sure of the height because she was standing on a higher level than the robber so it was difficult to judge (124).

Mr. Santorico testified at trial that the robber was about 5'7", 170 to 180 pounds (288) with tight thin lips, and a receding chin big nose (251). He further testified that the robber was wearing a short green jacket with a regular collar and a straw hat (244-6).

Mr. Tully described the robber a five feet eight inches in height weighing around 160 pounds with a fat face and wearing a light green jacket and a straw hat (361). At trial, all three witnesses positively identified petitioner. (88, 233, 317)

ARGUMENT

THE THREE POSITIVE PRE-STOVALL IDENTIFICATIONS OF PETITIONER AT BOTH THE LINEUP AND AT TRIAL WERE RELIABLE, UNTAINTED BY PRE-TRIAL IDENTIFICATION PROCEDURES, AND DID NOT VIOLATE DUE PROCESS OF LAW.

Almost two decades after the affirmance of his 1953 robbery and assault conviction in State Court, petitioner now claims on federal habeas review that the pre-trial identi-

fication procedures employed in two of the three eyewitness identifications were so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. This claim is spurious and wholly unsupported by the record.

- A. The identifications were reliable under the totality of the circumstances.

Identifications preceding Stovall v. Denno, 388 U.S. 293 (1967) as in the instant case are judged according to a general due process standard. Identification, even though possibly tainted by suggestive procedures, is not automatically excluded or deemed violative of due process. The general test as laid out in Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, supra, states that the identification must be so impermissibly or unnecessarily suggestive as to give rise to a substantial likelihood of misidentification.

Even where an identification procedure is found to be suggestive; the resulting identification, if based on reliable independent recollection, may comply with due process. This inquiry turns on the "totality of the circumstances" Neil v. Biggers, 409 U.S. 188 (1972) and involves an appraisal of such external factors as

"the opportunity of the witness to view the criminal at the time of the crime; the witness' prior description of the criminal; the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation."
Neil v. Biggers, supra at 199.

Applying these factors to the case at bar, it is clear that the three eyewitness identifications of petitioner at the lineup and trial were reliable and devoid of any substantial likelihood of misidentification. The robbery occurred in daylight; all three witnesses, Mrs. Tully, Mr. Santorico and Mr. Tully testified that they had gotten a good look at petitioner. Mrs. Tully, who does not wear glasses, stated that when petitioner rang the elevator bell he was not a foot away from her. She kept watching him until the elevator came (88). When the elevator arrived, petitioner stepped on to the elevator and requested floor two (96) but Mrs. Tully testified that she remained on the sidewalk because she did not ride the elevator with strangers (243). Up to this time the robbery had not commenced. Thus, Mrs. Tully was able to observe petitioner in a calm and collected manner unimpaired by any emotional disturbance. Furthermore, the fact that Mrs. Tully would

not ride the elevator with a stranger would not only naturally cause her to take better note of petitioner's face but to impress on her mind the observation made of petitioner for the half minute she watched him before the elevator arrived.

As the court stated in United States ex rel. Phipps v. Follette, 428 F. 2d 912, 916 (2d Cir. 1970) cert. den. 400 U.S. 908 (1970), "(h)is 20 to 30 second observation was much more than a fleeting glance, as anyone who watches the second hand of a clock sweep by for that period can attest."

When the robbery commenced Mrs. Tully was told "Get in there or I will kill you." (105) Mrs. Tully got into the elevator and was facing petitioner three or four feet away (110). At this point Mrs. Tully became the victim and was thus provided with an additional reason to study petitioner's face. The Courts have recognized that a victim as opposed to a casual bystander is more likely to take note of the perpetrator's face. Neil v. Biggers, supra at 200, Accord, United States v. Mims, 481 F. 2d 636, 637 (2d Cir. 1973).

Mr. Santorico, the elevator operator, was the second witness to view petitioner at close range and for a considerable length of time. When the elevator arrived he was two feet from petitioner and facing him (222). When attempting to guide petitioner to the stairway he was right next to petitioner (223). Thus, up to this point in time Mr. Santorico also had the opportunity to view petitioner in a calm manner. When petitioner pulled a gun, Mr. Santorico was two or three feet away from petitioner and facing him. When asked on cross examination if he looked at the man's face Mr. Santorico replied "I was staring at him sir." (248)

Mr. Tully the third eyewitness to the crime, was seated in his car twenty feet away (329). He watched petitioner get on the elevator while his wife remained on the sidewalk (322). As Mr. Santorico was attempting to guide petitioner to the stairway, petitioner was facing Mr. Tully (321). After getting the money, petitioner got into Mr. Tully's car, demanding that he get going. Mr. Tully explained that he couldn't because the accomplice had taken the keys. (307) During this time Mr. Tully was able to view petitioner at very close range since petitioner had seated himself in the front seat next to Mr. Tully.

At this point Mr. Tully noticed that the color of petitioner's hair which was tucked under his hat was grey (349, 379).

Thus each witness was able to view petitioner's unmasked face, in daylight, at very close range, and for a considerable length of time. They were provided with more than sufficient opportunity to see and remember his face. In fact, the length of time which each of these witnesses viewed petitioner is well beyond that which the courts have found sufficient for a reliable identification. United States ex rel. Phipps v. Follette, supra, (Victim struggled with assailant only twenty to thirty seconds), United States v. Yanishefsky, 500 F. 2d 327 (2d Cir. 1974) (momentary viewing of the side of appellant's face); United States ex rel. Birt v. Schubin, 498 F. 2d 396 (2d Cir. 1974) (brief viewing of a fleeing robber by a fourteen year old narcotics addict); United States ex rel. Cummings v. Zelker, 455 F. 2d 714 (2d Cir. 1972) (fifteen second observation).

The second factor to consider in determining reliability of identification is the witnesses prior description of the criminal. In the case at bar the descriptions of petitioner given by Mr. and Mrs. Tully and Mr. Santorico were sufficiently specific and with almost no variation.

Mrs. Tully described the robber as white between five feet eight and ten inches, although she stated that it was difficult to judge his height because she was standing on a higher level (124). Mrs. Tully further described the robber as weighing approximately one hundred and seventy pounds heavy built with a chubby face and possibly of Polish extraction. Mrs. Tully described the robber as clean shaven wearing a green waistline jacket and a straw hat with a green leaf in the band. (122-3, 410)

Mr. Tully described the robber as about five foot eight inches in height, weighing about one hundred and sixty pounds with a sort of fat face and greyish hair. He described the robber as wearing a light green jacket and straw hat (361).

Mr. Santorico the elevator operator, described the robber as tall and heavy set with thin light lips (251). When asked on cross examination at trial why he did not tell the police the approximate weight of the robber, Mr. Santorico replied that the police did not question him about the weight (250). He further told the police that the robber was wearing a green jacket (251).

The descriptions by all three witnesses were remarkably similar. All three described the robber as having a heavy build and wearing a green jacket. Mr. and Mrs. Tully both described petitioner as having a chubby face. The height description varied only an inch and the weight description by only ten pounds. This variance was an understandable difference in estimation and minimal.

Moreover, the witnesses exhibited keen powers of observation especially Mrs. Tully, who remembered such detail as the fact that the robber's jacket had a flat collar and the robber's hat had a green leaf in the band (82, 104, 410). Mrs. Tully was also able to describe the robber's gun in detail as being nickel plated and a silver color which shone in the sun (102). It was also elicited on cross examination that Mrs. Tully noticed that the robber had a tight mouth (105) which coincided with Mr. Santorico's description.

The fact that Mr. Tully, Mrs. Tully and Mr. Santorico had sufficient opportunity to view petitioner was exhibited not only by their consistent descriptions of the robber but more so by their positive unequivocal identification of petitioner at the lineup.

Finally, the length of time between the crime and the lineup was comparatively short. Compare United States ex rel. Carnegie, MacDougall, 422 F. 2d 353 (2d Cir. 1970), cert. denied, 388 U.S. 912 (identification evidence allowed where inter alia, a showup occurred three months after the crime) See also United States v. Casscles, 489 F. 2d 20, 26 (2d Cir. 1973) cert. denied 416 U.S. 959 (1974).

- B. The Lineup Procedures complied with due process and the lineup identifications were reliable.

On October 22, 1953, the same day that petitioner was taken into custody, a lineup was conducted. This was approximately a month after the robbery. The lineup was conducted with utmost fairness and free of any suggestion. All five men were approximately the same height and weight (445-6). All wore casual clothes (70, 279, 373-374) as did petitioner. Each participant in the lineup testified at trial and was thereby viewed by the jury (1014; 1029, 1044). All three witnesses viewed the lineup one at a time (179-180) and as they had been instructed, did not converse with one another (66, 182). When each witness emerged from the lineup room each went into a different corner of the room and had no conversation with either of

the other two (182). Before the second viewing of the lineup, petitioner was told he could change his position in the lineup but he declined (448). All three witnesses made a positive identification of petitioner as the robber (68, 288, 317). Mrs. Tully stated "I recognized him immediately." When questioned as to the source of her recollection Mrs. Tully stated "(i)t was merely a matter of recognizing his face. I saw him and I recognized him again when I saw him." (186) When asked if Mr. Santorico was positive about his identification of petitioner Santorico replied: "He held a gun on me how could I forget it." (288)

Petitioner states in his brief p. 12 that after the lineup the witnesses discussed their identifications among one another and all agreed petitioner was the robber. This statement gives one the impression that their identification of petitioner was a group effort. Although after the lineup the witnesses did discuss their identifications, this was after each of the witnesses had separately identified petitioner in the lineup as being the robber. Each identification was made without any of the other witnesses hearing and without any consultation.

At the trial which commenced in April, 1954 Mrs. Tully, Mr. Tully and Mr. Santorico positively identified petitioner as the same man as the robber. (68, 233, 317)

C. The pretrial photographic identification procedures were not suggestive and in any event did not taint any subsequent identifications.

Prior to the time when petitioner was taken into custody and the lineup was conducted, all three witnesses were shown numerous photographs. Petitioner claims that manner in which these photographs were shown to Mrs. Tully and Mr. Tully was so impermissibly suggestive as to make their subsequent identification of petitioner at the lineup and at trial unreliable. This claim is without merit.

The day of the robbery Mr. and Mrs. Tully went to the Rogues Gallery to look at pictures. A photograph of petitioner was among those viewed but was not identified. However, that picture of petitioner (People's Exhibit 6 703-4) had been taken in 1938, fifteen years prior to the robbery (387). In fact when Mrs. Tully was shown the picture at a later date, she did not recognize it because

it was of a young man. (139) Mrs. Tully was then shown a second picture of appellant taken in 1952. Mrs. Tully replied that it looks like the face but the man would have to be twenty to thirty pounds heavier (155, 430, 431). On each occasion when Mrs. Tully was shown these pictures neither Mr. Tully nor Mr. Santorico were present (138, 153-154).

The testimony at trial as to the manner in which Mrs. Tully was shown these pictures was inconsistent. Detective Buchs testified that he showed Mrs. Tully approximately five pictures which she went through one after the other (428-430), while Mrs. Tully testified that she saw only one picture (153). When Mr. Tully viewed the 1952 picture of petitioner it was shown with other photographs. However, the police asked Mr. Tully if he recognized the photograph of petitioner. Mr. Tully replied that the robber was heavier and he would have to see the man in person (369). On the same day, Mrs. Tully was again shown the 1952 picture of petitioner but in a group with other photographs. She recognized the picture from the prior day, but again refused to positively identify

it and reiterated the fact that she would have to see the man. (155) Aside from the numerous pictures which Mr. and Mrs. Tully had seen in the Rogues Gallery, Mrs. Tully was shown approximately fifty pictures (427).

Petitioner claims that the viewing of these pictures by Mr. and Mrs. Tully caused irreparable misidentification of petitioner. It should be noted at the outset that this claim pertains only to two of the three eyewitnesses, Mr. Tully and Mrs. Tully. Mr. Santorico's identification of petitioner at the lineup was not preceded by any suggestive procedures. He was always shown pictures in a group and was not questioned about any specific picture (236-7). Further, nothing was said to him about any of the other witnesses' possible identification. Despite the absence of any suggestive procedures, Mr. Santorico positively identified petitioner at the lineup and at trial (233).

Petitioner claims in his brief (Br. p. 12) that Mr. Santorico at first stated that he could not identify petitioner. Yet the record does not support this conclusion. Mr. Santorico was asked "Who was with you, when you saw Mysholowsky?" Mr. Santorico replied "Well, it was men

there and I couldn't recognize him there." (231) This answer can only be interpreted to mean that he did not recognize the other men in the room. Mr. Santorico was asked who was with him when he saw Mysholowsky, not whether he could identify Mysholowsky. This is further substantiated by the testimony immediately following this statement where Mr. Santorico stated that he recognized petitioner in the lineup and correctly described petitioner's attire at that time, that is, wearing a plaid shirt (232).

Mr. Santorico's identification, which was positive and free of any suggestiveness, corroborated the identifications of the two other witnesses.

Assuming arguendo that the police procedure of showing petitioner's picture to Mr. and Mrs. Tully was suggestive, it was not so impermissibly suggestive as to render any of their respective subsequent identifications unreliable.

Although, the record is unclear as to whether Mr. or Mrs. Tully were shown pictures in a group or singly, the record is clear that on each occasion when either witness

was shown a picture of petitioner, the police merely asked, whether the witness recognized this picture. On no occasion did the police state that petitioner had a criminal record, was under suspicion, or that they thought he was the robber. Moreover the police were careful to isolate each witness when they viewed pictures to prevent them from influencing one another. In fact Mrs. Tully testified that when she was at the police station while her husband was viewing petitioner's picture, she remained on the other side of the room. The detective had asked her not to influence her husband in any way, to keep out of it and let her husband make his own decision (171). The absence of police pressure has been considered relevant in a finding of non-suggestiveness Simmons v. United States, supra at 385. In United States ex rel. Gonzalez v. Zelker, 477 F. 2d 797, 803 (2d Cir. 1973) which involved a pre-Stovall viewing of only two photographs of appellant and his co-defendant, the Court stated that "... while the procedure here was suggestive there is no indication at all that the police were guilty of any activity designed to unfairly influence the trial of relator.

They were unable to anticipate Miranda and Simmons and were not attempting to circumvent normal procedures. There is no suggestion in the record that the police persuaded or coerced Mrs. D'Amora."

Moreover, at the time Mr. and Mrs. Tully viewed photographs, the robber was still at large so it was impossible to conduct a lineup. Further, it was necessary for the police to show pictures in order that the culprit could be identified and apprehended. The Supreme Court has recognized that identification by photographs

"... has been used widely and effectively in criminal law enforcement, from the standpoint of both apprehending offenders and of sparing innocent suspects the agony of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs. Simmons v. United States, supra at 384."

An important factor vitiating any suggestiveness and bolstering the reliability of the identifications were the witnesses themselves. All three witnesses were scrupulous about making honest identifications. When both Mrs. Tully and Mr. Tully separately viewed the 1952 photograph of petitioner they would not make a positive identification because the robber was heavier. Appellant makes much of the fact that Mr. Tully had a conversation with his wife prior to viewing the 1952 photographs in that Mrs. Tully told her husband that the picture looked like the man. Yet Mrs. Tully followed this statement with by saying that she doubted it was the man. Regardless of any possible influence, Mr. Tully exhibited his caution by refusing to positively identify the picture and stating he would have to see the man in person.

The case at bar differs from those where an identification involving suggestive procedures tainted a later identification. In the instant case Mr. and Mrs. Tully refused to identify the picture of petitioner regardless of any suggestive procedures. Yet when the line-up was conducted and the witnesses viewed petitioner in person, along with others of similar characteristics, all three witnesses identified petitioner without hesitation. This is clearly distinguishable from Foster v. California, 394 U.S. 440 (1969), where the witness after seeing the defendant in a suggestive line-up followed by a face to face confrontation still was unsure if the defendant was the perpetrator. His subsequent identification was held to be "all but inevitable" under the circumstances.

The federal courts have found identifications to be reliable despite "suggestiveness" in cases much more glaring than the case at bar. In United States ex rel. Rutherford v. Deegan, 406 F. 2d 217, 219-220 (2d Cir., 1969), cert. den. 385 U.S. 936 (1970) the witness was told by the police that they had a suspect and asked her to come down and look at him. The witness viewed the suspect who was black, in a room with all white policemen. Despite the suggestiveness, the court found the identification

reliable, considering the fact that the robber did not wear any disguise, the store was well lit, and the witness claimed she had watched him closely. Considering the same factors as those enunciated in the above case the federal courts have found reliable identifications despite suggestive procedures in scores of cases.

One of the most recent cases United States ex rel. Pella v. Reid, ___ F. 2d ___, (2d Cir., 1975), Slip op. 1025, December 11, 1975, involved a witness, who was initially unable to identify the defendant in a suggestive line-up, but later made an identification from photographs of the same line-up. Despite any suggestiveness the Court found the identification reliable. See also, Smiley v. LaVallee, 473 F. 2d 682 (2d Cir., 1973), cert. den. 412 U.S. 905 (1975); United States v. Mims, supra; United States ex rel. Gonzalez v. Zelker, supra; United States ex rel. Phipps v. Follette, supra.

- D. The pre-Stovall identifications of petitioner were subjected to extensive cross-examination before the jury which found petitioner guilty.

A final factor which the courts have considered in determining reliability is the extent of cross-examination by defense counsel. This factor is deemed particularly important because it insures that all the facts concerning

alleged misidentification are before the jury. United States v. Casscles, supra at 26. Accord, United States v. Boston, 508 F. 2d 1171, 1178 (2d Cir., 1974). In the instant case defense counsel conducted extensive cross-examination covering hundreds of pages of testimony of each of the three identifications. A review of record demonstrates and that each picture of petitioner was offered into evidence and viewed by the jury. Every possible error or taint was delved into in great detail by defense counsel. Further, each witness was subjected to rigorous cross-examination as to the accuracy of his observations and the positiveness of his identification. Despite all this each witness remained steadfast in their identification of petitioner as the robber.

In this connection, it should be noted that the Supreme Court in Neil v. Biggers, supra, at 200, observed that Stovall was the first time the Court had served notice that suggestiveness of identification procedures was anything other than something to be argued to the jury. The instant case was long before Stovall.

E. Petitioner's lie detector tests and purported alibi evidence are irrelevant.

Petitioner argues at great length that he is innocent of the crime, pointing to purported results of lie detector tests taken nearly a quarter century ago. (P. Br. 19-20.) These tests were said to indicate responses "typical" of those given by persons telling the truth.

This argument is an irrelevant red herring, and moreover contradicts completely the thrust of petitioner's entire argument. Results of lie detector tests are inadmissible under state law on the grounds of unreliability, Matter of Sowa v. Looney, 23 N Y 2d 329 (1968), the same essential grounds as petitioner would have this Court reject the identification evidence.

Similarly, petitioner also attaches great weight to his alibi evidence at trial in an attempt to show his claimed innocence. (P. Br. 18-19.) This too is obviously and patently an irrelevant red herring. An alibi defense is recognized as one of the weakest in criminal law, and in any event whether to believe the alibi testimony was a question for the jury.

Further, petitioner claims there was absolutely

no corroborating evidence that might tend to support the accuracy of the identifications. This is false. The getaway car which had an obscured license plate (356) was described as a 1947-1948 bluish-green Buick. When questioned by the police Petitioner's co-defendant Sadowy claimed that no member of his family owned a car and that he never drove a Buick (401, 403). Yet at trial Sadowy testified that his wife owned a 1948 blue Buick and that he had driven it several times when he was working (562). Sadowy further testified that he met petitioner while they were both inmates in Dannemora State Prison (632).

F. Petitioner's Unexplained Delay of Two Decades in filing his federal writ casts doubt on the credibility of his claims.

Finally, petitioner's claims must be considered in light of his totally unexplained delay of nearly two decades in raising any identification claim in federal court. Such a delay casts grave doubts on the credibility of his contentions as the Court said in United States ex rel. Darrah v. Brierly, 415 F. 2d 9, 12 (3rd Cir., 1969):

"The long strange delay in claiming fundamental constitutional rights cannot be ignored. It, of itself, has substantial impact on appellant's credibility as a witness and affects

the quantum of proof necessary to establish the factual prerequisite for federal habeas corpus relief." Accord, Dean v. Stat. of North Carolina, 269 F. Supp. 986, 990 (M.D.N.C., 1967); Haynes v. Wainwright, 302 F. Supp. 716 (N.D.D.C., Fla., 1969).

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
January 15, 1976

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOAN P. SCANNELL, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for respondent appellee herein. On the 15 day of January, 1976, she served the annexed upon the following named person :

William J. Gallagher Esq.
90 Shelton Hensberg Esq.
Federal Defender Services Unit
509 United States Courthouse
Foley Sq. N.Y.C.

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Joan P. Scannell

Sworn to before me this
15 day of January, 1976

Walter Leithen Carol
Assistant Attorney General
of the State of New York

Deputy

